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978-0-521-51979-3 - The Taney Period, 1836-1864, Volume V
Carl B. Swisher
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HISTORY OF THE SUPREME COURT OF THE UNITED STATES

The Taney Period, 1836–1864, by Carl B. Swisher, is the fifth volume of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*. The volume opens with Roger B. Taney's appointment as chief justice of the Court, describing the Taney Court and its personnel. Later chapters offer a comprehensive analysis of the leading constitutional issues addressed by the United States Supreme Court during this period. Swisher covers the Taney Court's decisions on commerce power, admiralty and maritime jurisdiction, the rights of corporations, patent rights and free enterprise, and legal decisions relating to slavery, including a detailed analysis the Dred Scott decision and its aftermath. The volume ends with the close of the Taney Period, which coincided with cases and constitutional issues related to the Civil War, including Lincoln's appointments to the Supreme Court, Northern nullification, and wartime curtailment of civil rights.

Carl B. Swisher (1897–1968) was Thomas P. Stran Professor of Political Science at John Hopkins University. He wrote numerous articles and several books on constitutional history, including his authoritative biography of Andrew Jackson's chief justice, *Roger B. Taney* (1935); *The Growth of Constitutional Power in the U.S.* (1945); and *Historic Decisions of the Supreme Court* (1979).

THE OLIVER WENDELL HOLMES DEVISE
HISTORY OF THE SUPREME COURT
OF THE UNITED STATES

General Editor: STANLEY N. KATZ

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Foreword to the Cambridge Edition

WHEN JUSTICE OLIVER WENDELL HOLMES died, he left his entire estate to the Congress of the United States, which, after a long lapse, established the Permanent Committee for the Oliver Wendell Holmes Devise. The Committee consists of five members, four appointed by the President of the United States and the fifth, the chair, by the Librarian of Congress. More than half a century ago the Committee decided that its principal purpose would be to commission a multi-volume history of the Supreme Court of the United States. The Holmes Devise History was originally envisioned as an eleven-volume series, concluding with a volume on the Hughes Court and ending in 1941. More recently, the Committee decided to extend the coverage of the series and commissioned new volumes, one on the Stone and Vinson Courts, and another on the Warren Court. It is possible that further volumes will be commissioned for subsequent Courts.

The Holmes Devise History has had a complicated history. A few of the initially commissioned volumes appeared fairly promptly, but many were long delayed. A few of the authors abandoned their volumes. Others passed away before they could complete their volumes, and new authors were appointed. As of 2009, two of the original volumes, as well as the recently commissioned volume on the Warren Court, have yet to appear, though we hope to see them within the next few years. The series was initially published by Macmillan, but after that firm ceased to do business, the Committee was fortunate enough to be able to contract with Cambridge University Press to publish the remaining volumes—and, remarkably, to put the earlier volumes back into print. The Committee is deeply grateful to Cambridge for undertaking this large and important publishing project.

The conception of the Holmes Devise History has also changed substantially over the years. Under its original Editor in Chief, Professor Paul Freund of Harvard Law School, the individual volumes were conceived of as nearly encyclopedic. Authors were expected to cover all of the most significant cases

FOREWORD TO THE CAMBRIDGE EDITION

decided by the Supreme Court of the United States, as well as to provide exhaustive biographical accounts of the Justices. After I became the Co-Editor with Paul Freund in 1978, however, authors were asked to take a more focused and analytical approach. More recent volumes are somewhat shorter and significantly more thematic, though I hope it is fair to say that each volume remains the major account of the Supreme Court during the period it covers.

I have been the Editor in Chief since 1990, and it gives me special pleasure to know that the entire series is now back in print and available to readers. The Holmes Devise project is one of the most ambitious in the history of American law, and I believe it is true to say of the Holmes Devise History that the whole is much more than the sum of its parts. While I cannot describe myself as a neutral party (I was, after all, a member of the Permanent Committee from 1974 until 1980), I also think it likely that Justice Holmes would have admired both the seriousness and comprehensiveness of the History of the United States Supreme Court, for it is much more than a handsome set for one's library shelves! I trust that it will prove useful to scholars, lawyers, and general readers for many years to come.

Stanley N. Katz

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Foreword

FOR THOSE who have participated in administering the Oliver Wendell Holmes Devise as well as for legal scholars everywhere, the publication of another volume in the Holmes Devise *History of the Supreme Court of the United States* series is an important milestone. The current work—*The Taney Period, 1836–1864* by the late Carl B. Swisher—is Volume V in the series and is the third to be published out of the twelve proposed.

Congress in 1955 enacted legislation to establish the Oliver Wendell Holmes Devise Fund and the Permanent Committee for the Oliver Wendell Holmes Devise (Public Law 84–246). In effect, this act determined that preparation and publication of a definitive history of the Supreme Court would be the most appropriate use to make of the funds bequeathed to the United States by the late Justice Holmes.

The first two volumes in the series were published in 1971—Volume I, *Antecedents and Beginnings to 1801*, by the late Julius Goebel, Jr., and Volume VI, *Reconstruction and Reunion, 1864–1888, Part One*, by Charles Fairman. Now the third, Mr. Swisher's analysis of the court during the years between the death of Chief Justice Marshall and the end of the Civil War, adds another tier to the monument erected to Justice Holmes.

The author of the present volume, Carl B. Swisher, was Thomas P. Stran Professor of Political Science at Johns Hopkins University, a former president of the American Political Science Association, and the author of a number of works on American constitutional history. Mr. Swisher, who retired from Johns Hopkins in 1967, had completed the manuscript for this volume before his death in 1968. Paul A. Freund, editor-in-chief of the Holmes Devise *History* series, has been responsible both for the final editing and for shepherding the work through the press.

Achievement of the aims of Public Law 84–246 has been shared by Mr. Freund, by the other legal scholars and historians selected to write the different segments of the *History of the Supreme Court of the United States*—of

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whom Mr. Swisher was one—and by the members of the Permanent Committee for the Oliver Wendell Holmes Devise. In accordance with the provisions of the act, thirteen public members (listed on page xvii) have been appointed by the President of the United States and have served for varying lengths of time since the Committee's inception. As Chairman *ex officio* I want to express my gratitude to the editor-in-chief, to the authors, and to the Committee members for their dedication and support.

L. Quincy Mumford
LIBRARIAN OF CONGRESS

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Editor's Foreword

WHEN JOHN MARSHALL neared the end of his Chief Justiceship, he was deeply apprehensive of the future, fearful that the principles which he and his colleagues had moulded from the Constitution would be abandoned and betrayed. When, in turn, Roger Brooke Taney approached the close of his thirty-year term as Chief Justice, he despaired of the survival of the constitutional government which he had labored to preserve as he understood it. Taney's fears were by no means unfounded. In December 1860, an eminent fellow-Marylander, arguing before Taney's court in Washington could declare without excessive rhetoric that "This may be the last time that the Court will sit in a peaceful judgment on a Constitution acknowledged and obeyed by all."

Marshall's apprehensions, on the other hand, were surely exaggerated. It could not be expected that even the Great Chief Justice could contain the tensions and complexities of a growing and diverse country within simple and absolute doctrinal formulas. To continue the broad reading of the obligation of contract guarantee would have fettered the regulatory powers of government and the encouragement of economic competition; to apply literally the dictum that the power of Congress over commerce among the states is exclusive would have needlessly and single-mindedly sacrificed the interests of local welfare to the pressures toward a common market. What was needed was the practical and philosophical wisdom of a Lord Acton: "When you perceive a truth, look for the balancing truth."

This outlook, in the staple business of the Court, characterized the decisions, if not always the opinions, of the Taney period. Viewed against the background of the Marshall court their thrust was not upheaval but complementarity. Property was not subordinated; rather, it was seen that two kinds of property interests were generally in conflict: those already secured and those reflecting new and competing enterprise. The contest was not so much over the vindication of property rights as over the conflict between the security of acquisitions and the security of transactions. The Taney Court's more tolerant

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view of public fostering of new competitive enterprise helped to make possible the advances in modes of transportation and the growth of an aggressive capitalism. Similarly in the field of federal versus state power over commerce, it was seen that many forms of local regulation, in the interest of health or safety or financial integrity, were not incompatible with the needs of a common market. Difficulties of a conceptual sort plagued the Court and fragmented it: must local regulation be justified not as a regulation of "commerce," but as an exercise of the "police power," or could the effect on commerce be frankly acknowledged and the measures justified under a concurrent power of the states to regulate, to some extent, commerce itself?

Beyond these conceptual difficulties lurked the unexorcised, intractable spectre of slavery in the Federal Union. Questions under the commerce power were potentially questions affecting slavery, fugitive slaves, and the covert foreign slave trade. Issues of state and federal power are vexing at best; when they are determined with an eye deflected to this overarching darkness, in terms of a judge's estimate of their implications and the intensity of his emotional involvement, it is no wonder that problems of federalism were not treated with the magisterial touch of a Marshall. Slavery brought its moral and intellectual ironies as well: courts and juries in the South resisting the enforcement of the laws against the slave trade, and in the North resisting the enforcement of the Fugitive Slave Law. For Supreme Court Justices sitting on circuit these challenges created painful confrontations with the populace.

The system of circuit duties is in fact a principal key to an understanding of the Court in the Taney period, and it is treated in rich detail in this volume. In the first place, the circuit-riding system severely conditioned the appointments to the Supreme Court. Since each Justice was required to sit with district judges in an assigned circuit to constitute the two-member circuit court, it was the practice to fill a Supreme Court vacancy from the bar or bench of the circuit served by the former Justice. A limited number of Senators thus had an interest in the appointment. In a period when party loyalties and animosities ran high, parochialism was added to partisanship in the selection of members of the highest Court. It is the less surprising, consequently, that political proclivities characterized many of the Justices after ascending the bench. Moreover, since the greater part of the year was spent on circuit duties, and since communication was slow, relations among the Justices, as well as between them and the Clerk and the Reporter, were often clouded by misunderstandings. The situation was not helped by the loose practice of revising an opinion after it had been announced but before publication.

Furthermore, circuit-riding contributed greatly to the beginning of a persistent problem for the Court, that of an excessive case load. Suggestions began to be advanced for an independent tier of courts of appeal, and a germinal beginning was made when an independent federal circuit judgeship was created for California in order to handle the immense litigation over land titles arising as a result of the gold rush. Such are the unpredictable ways of history.

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The often intricate story of the Court at Washington and on individual circuit duty has been woven by Professor Swisher into a rich and comprehensible pattern. This he has done by drawing skilfully on records in the lower courts, on official and private correspondence and diaries, on contemporary newspaper accounts and journalistic commentary, as well as on legislative and executive documents.

The present volume is, sadly, a posthumous work. Fortunately the manuscript had been completed by Professor Swisher before his death. The volume will stand as his ultimate monument, the testament of a deep-ploughing scholar who was graced with an endearing humility.

Paul A. Freund

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